In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 561

E. NEWBOLD SMITH, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES

This memorandum is being filed in response to the Court's invitation to the Solicitor General to file an expression of the government's views in this case.

STATEMENT

The relevant facts, insofar as the government's interest is concerned, are as follows:

On January 11, 1961, the Special Agent in Charge of the Philadelphia Office of the Federal Bureau of Investigation was served with what purported to be

a subpoena duces tecum issued by the Court of Quarter Sessions in and for the County of Chester, Pennsylvania [1] (R. 48-49) commanding him to appear at 10 a.m. on January 16 at a session to be held at West Chester, to testify in the case of *Commonwealth of Pennsylvania* v. *E. Newbold Smith*, Nos. 210, 210A, 211, 211A, and 211B, June Term, 1960 (a criminal prosecution for, *inter alia*, assault and battery; see *infra*), and to bring with him—

> Statements of all witnesses, diagrams, sketches and photographs taken in connection with investigation of incidents on Monday, August 8, 1960, at or about 9:00 P.M. and continuing thereafter in Thornbury Township and in the Borough of West Chester, Chester County, Pennsylvania, when peace officer Frank H. Elliott of Thornbury Township and police officers Harry Saltzman and Gordon W. Smith together with certain other West Chester Borough officers willfully subjected E. Newbold Smith of Warren Avenue, Paoli, Pennsylvania, to the deprivation of his rights, privileges and immunities secured and protected by the Constitution and the laws of the United States in violation of Title 18 U.S.C. Section 242. * * *

The investigation referred to in the subpoena, as appears from the Department file in this matter, had been undertaken by the F.B.I. at the request of the Civil Rights Division of the Department on a com-

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[1] As we point out below, the court subsequently held the subpoena invalid for failure to comply with a local rule prohibiting the issuance of a subpoena duces tecum for a public record or paper without the special order of a judge.

plaint filed by the defendant in the Pennsylvania case. It concerned an asserted deprivation of Smith's civil rights by officers of the West Chester Police Department, at the West Chester police station, on the night of August 8, 1960, following a roadside incident in which Smith had allegedly assaulted Frank Elliott, the chief of police of Thornbury Township. The affray, in which Smith was also injured, had resulted from the officer's stopping of Smith's car for a traffic violation. The F.B.I. investigative file in the matter was and is voluminous.

The Pennsylvania proceeding was a criminal prosecution of Smith for assault and battery upon officer Elliott in the roadside altercation, and for certain related offenses, including alleged acts of assault upon other officers later at the police station (R. 2, 43-44; Pet. 4). At the time of the service of the subpoena no federal prosecutive action had been initiated.[2]

On January 16, 1961, the date set for Smith's trial on the State charges, the agent to whom the subpoena was addressed appeared before the Chester County court accompanied by James Kelley, an Assistant

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[2] Two months later, on March 22, 1961, a federal indictment was returned in the Eastern District of Pennsylvania charging officer Elliott and two West Chester police officers with having willfully deprived Smith of his constitutional rights, in violation of 18 U.S.C. 242, by striking and kicking him at the police station with intent to inflict summary punishment on him. The federal indictment is still pending. The failure to schedule the case for trial has been occasioned by the fact that a key government witness to the events at the police station was subsequently involved in an accident; his injuries have substantially impaired his capacity to testify.

United States Attorney on the staff of the United States Attorney for the Eastern District of Pennsylvania (R. 53, 57-58). Mr. Kelley moved to quash the subpoena on the grounds (1) that the officer to whom it was directed was not the proper person on whom to effect service and (2) that the records called for pertained to a confidential investigation undertaken by the Department of Justice (R. 58). In an ensuing colloquy, counsel for Smith advised the court that the subpoena had been issued at the instance of the defense and that, in counsel's view, the subpoena was "in order" (R. 58-59). The court at this point asked defense counsel, "How about the rules of court which provide that no subpoena duces tecum [for a public record or paper] shall be issued without a special order of the judge[?]" (R. 59).[3] Counsel told the court that he had not been aware of this rule. The court thereupon made the following ruling (*ibid.*):

> Not limiting myself to the rule, that I have just mentioned, the rule of court, I am going to allow the motion to quash.

A jury was then empaneled to try the State charges and an adjournment was taken to the following day (R. 60).

On the next day, January 17, Smith filed a petition formally requesting the court to issue a subpoena duces tecum for the F.B.I.'s investigative file (R. 53-

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[3] The court rule referred to by the judge states: "No subpoena duces tecum for a public record or paper shall be issued without the special order of the Judge" (R. 54, 410; Pet. App. C, p. 31).

56). The petition recited the service of the earlier invalid subpoena, the appearance of the F.B.I. official in response thereto the Assistant United States Attorney's motion to quash, and the court's ruling (R. 53-54). Paragraph 4 of the petition stated (*ibid.*):

> 4. That your petitioner believes and therefore avers that included in said report are signed statements of Yvonne Cochrane and Betty Sweet, alleged eyewitnesses to some of said events of August 8, 1960, who have categorically refused to discuss what they saw with your petitioner or his representatives, although they have freely given statements to the prosecutors herein.

The petition concluded with an averment that it was important to Smith's defense to have the F.B.I. records and reports available at his trial (R. 54). Notice of the petition was not given to any federal official, and none was present at the hearing.

The court denied the petition, stating that "the only reason for the denial is that the information sought for in paragraph four of the petition is being made available to the defendant by the District Attorney" (R. 61). The "information" which the court said was being made available to the defense by the District Attorney (*i.e.*, the Commonwealth's Attorney) consisted of statements made by the two named women to the local police on the evening of August 9, 1960, the day following the roadside episode which gave rise to the State charges (R. 123-127, 130-131, 139-141; Pet. 6).[4]

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[4] The Department file reflects that the Commonwealth's Attorney asked the United States Attorney for copies of the

Miss Sweet and Mrs. Cochrane each testified to having witnessed the encounter between Smith and officer Elliott—from a car operated by Mrs. Cochrane in which Miss Sweet was a passenger—and each said that it was Smith who struck the first blow (R. 118-120, 125, 127-129). Their testimony in this regard was consistent with Elliot's (R. 63-64) but was subsequently contradicted by Smith (R. 246-247). As Miss Sweet and Mrs. Cochrane completed their direct testimony, the prosecution delivered to the defense counsel, for purposes of cross-examination, the witnesses' statements to the local authorities on the evening following the altercation, and counsel used the statements in efforts to impeach their testimony (R. 123-124, 125-127, 130-131, 139). To that end, he brought out that in her pre-trial statement, Miss Sweet had said that when she heard "Yvonne Corcoran [*sic*] exclaim that Officer is being attacked, * * * I then turned and looked toward the officer" (R. 126). Asked by counsel why she had made this statement if in fact she had seen the beginning of the physical exchange, as she had testified, the witness replied that she did not know (R. 126-127).

Following the completion of Miss Sweet's testimony, and after Mrs. Cochrane had testified on direct but

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F.B.I. reports in this matter prior to the State trial, but that the United States Attorney was instructed by the Department to advise the attorne, that the reports could not be made available outside the Department because they related to a matter concerning which the Department had not taken final action. The United States Attorney thereafter so advised the State prosecutor (R. 132).

before her cross-examination, defense counsel renewed his application for a subpoena duces tecum requiring the production of the F.B.I. "[f]ile" in this matter, "particularly with reference to the statement[s] given by these ladies." Counsel referred to "a discrepancy" which he believed existed between Miss Sweet's testimony and her statement to the F.B.I., in that her statement to the F.B.I. "does not include any observation of who struck the first blow whereas today she states that Mr. Smith did" (R. 131). These representations were, of course, based upon assumptions that the two women had given statements to the F.B.I. and that Miss Sweet's was inconsistent with her trial testimony to the extent indicated.[5] The court denied the motion, stating that it would not reconsider its previous ruling (R. 132).

Smith was convicted of the charge of assault upon officer Elliott and acquitted of the remaining charges (R. 352; Pet. 7). A motion for a new trial, based in part on the court's refusal to issue a subpoena duces tecum for the F.B.I.'s files and records, was denied with opinion (Pet. App. C., pp. 31-35; Pet. App. E, p. 39), and Smith was sentenced to 30 days' imprisonment and to pay a fine of $1,000 and the costs of the prosecution (R. 417; Pet. App. E, p. 39). On appeal, the Superior Court of Pennsylvania affirmed the conviction (198 Pa. Super. 499). The judgment of the latter court was in turn affirmed by the Supreme Court of Pennsylvania, one judge dissenting (Pet. App. A and B, pp. 21-30).

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[5] In fact, Miss Sweet and Mrs. Cochrane made signed statements to the F.B.I. on September 21, 1960.

DISCUSSION

The petition for certiorari and the brief *amici curiae* have been confused by two misconceptions as to the conduct of federal officials.[6] The facts are that—

(1) Neither the Department of Justice nor its local representatives ever refused a specific request for statements given by witnesses who had testified or were definitely scheduled to testify against the defendant in the criminal prosecution.

(2) The Assistant United States Attorney was acting with the authority and upon the instructions of the Department of Justice.

The significance of these facts is apparent from the sequence of events. The subpoena served on the Philadelphia special agent in charge in this case, which the State court quashed under the circumstances we have related, called for the production of "[s]tatements of *all* witnesses, diagrams, sketches and photographs taken in connection with [the F.B.I.'s investigation of the incidents in question]" (*supra*, p. 2; emphasis added). There was no request for, or reference to, any specific document or paper in the file. Neither of the two women (Mrs. Cochrane and Miss Sweet) whose names figured in the subsequent discussions and events (after the federal government's connection with the case had terminated) was mentioned. The subpoena was simply a broad-based de-

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[6] The first of these misconceptions was apparently shared by the court below. Pet. App. A, p. 22.

mand for virtually the entire contents of an F.B.I. file on a matter which the Department had currently under investigation.

It was for this reason that the Department resisted the subpoena as violative of the confidentiality of executive records in a matter still in live status. For the same reason, we believe that the State court's order of January 16, 1961, granting Assistant United States Attorney Kelley's motion to quash the subpoena (*supra*, pp. 3-4), was correct—wholly apart from the additional and independent ground on which the court declared the subpoena invalid, *viz.*, counsel's failure to comply with the local rule of court prohibiting the issuance of a subpoena duces tecum for a public record or paper without the special order of a judge.

Contrary to the assumption of the *amici curiae* (Br. 2-4; cf. Pet. 9), the Assistant United States Attorney who represented the special agent in the proceedings on the subpoena was not acting on his own authority and responsibility in claiming privilege as to the contents of the F.B.I. file. The Department file shows that the United States Attorney had consulted the Department concerning the subpoena and had been advised by the Department that the special agent should decline to produce the documents called for. The *amici* are also mistaken (see Br. 3)—as are the petitioner and the trial court (Pet. 6-7, 15, 16, n. 12; Pet. App. C, pp. 31-32; Pet. App. D, pp. 36-38)—in their assumption that the Department regulation pertaining to the production of subpoenaed materials in the Department's files in effect at the time of the

relevant proceedings was Supplement No. 2 to Order 3229, issued June 6, 1947. The latter regulation had been revoked and superseded by Revised Order 3229 of January 13, 1953 (18 F. R. 1368). The revised order directed[7] that "[w]hen a United States Attorney or any other officer or employee of the Department of Justice is served with a subpoena or order for the production or disclosure of materials or information contained in the files of the Department, the United States Attorney, or such other attorney as may be designated, will appear with the person upon whom the demand is made and inform the court or other issuing authority that such person is not authorized to produce or disclose the materials or information sought"; that "[t]ime will be requested within which to refer the subpoena or order to the Attorney General * * *"; and that "[i]n the event the court declines to defer a ruling until instructions from the Attorney General have been received, or in the event the court rules adversely on a claim of privilege asserted under instructions of the Attorney General, the person upon whom such demand is made will, pursuant to this order, respectfully decline to produce the material or information sought." (As we have indicated, the Department's instructions had been received by the United States Attorney prior to the return date of the subpoena.)

It was not until the day following the quashing of the subpoena, January 17, when the defendant filed

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[7] Revised Order 3229 has since been superseded (without pertinent change) by Order 260-62 of January 19, 1962 (27 F.R. 774).

a petition formally requesting the court to issue a subpoena duces tecum for the F.B.I.'s records, that the defense became more specific as to the papers in the file which it wished. It particularly desired, it stated, "signed statements of Yvonne Cochrane and Betty Sweet, alleged eyewitnesses to some of said events of August 8, 1960 * * *" (*supra*, p. 5). And at the trial, after Miss Sweet and Mrs. Cochrane had testified as prosecution witnesses, the defense, in renewing its request that the F.B.I. "[f]ile" in this matter be subpoenaed, qualified its request with the words "particularly with reference to the statement[s] given by these ladies." Counsel referred in this connection to "a discrepancy" which, he said, he believed existed between Miss Sweet's testimony and her statement to the F.B.I. with respect to the matter of which participant in the roadside affray struck the first blow (*supra*, pp. 6-7).

All of these exchanges occurred between the respective trial attorneys and the trial judge. No one was notified or present from the Department of Justice. At no time has a request for a particular document in the F.B.I. file been presented to any federal officer. The only demand with which the federal government has been confronted has been, as noted, the original blanket demand for practically the entire contents of a voluminous file relating to an ongoing investigation—a demand as to which the Department properly asserted privilege in the motion to quash the defense's subpoena. The Department has never been requested to consider whether, in the interests of

justice, the information contained in either Miss Sweet's or Mrs. Cochrane's statement to the F.B.I. should be made available to the court and counsel in the Pennsylvania prosecution.

The issues presented, therefore, would seem to be: (1) whether the trial court erred in denying a subpoena for specific documents which would have called upon the federal government to decide whether to furnish prior statements by witnesses in a State prosecution; (2) whether counsel distinguished between his initial catch-all demand and subsequent request with sufficient clarity to present the question to the trial court; and (3) whether the error, if any, was harmless, as held by the court below. Since no question of federal privilege or of the consequences of the assertion of a federal privilege is involved, the United States has no official interest in the case.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1964.

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